Supreme Court of The United States

OCTOBER TERM, 1958

No. .....

B. M. KILGORE, *Petitioner*

versus

THE STATE OF SOUTH CAROLINA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of Case	4
Reasons for Granting the Writ	5
Appendix	7

CITATIONS

	Page
Carter v. Commonwealth of Virginia, 321 U.S. 131, 64 S. Ct. 464	5
Champlain Realty Co. v. Town of Brattleboro, 260 U.S. 366, 43 S. Ct. 146	6
Duckworth v. Arkansas, 314 U.S. 390, 62 S. Ct. 311, 86 L. Ed. 294, 138 A.L.R. 1144	5
Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 64 S. Ct. 622	5

OTHER REFERENCES

U. S. Constitution, Art. 1, Sec. 8	3
U. S. Constitution, Amendment XXI, Sec. 2	3
Sec. 65-1267 of the *Code of Laws of South Carolina*, 1952	3
Sec. 65-1270 of the *Code of Laws of South Carolina*, 1952	4

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versus

THE STATE OF SOUTH CAROLINA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

The Petitioner prays that a Writ of Certiorari issue to review the decision and judgment of the Supreme Court of South Carolina entered in this case on the 17th day of April, 1958.

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina (App. 12) is reported at 103 S.E. 2d 321. The order of the County Court of Greenville County (App. 9) is not reported.

JURISDICTION

The judgment of the Supreme Court of South Carolina was entered April 17, 1958. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. A. 1257.

QUESTION PRESENTED

Whether the action of law enforcement officers of the State of South Carolina in confiscating four four-fifths of whiskey from Petitioner and causing a warrant to issue against Petitioner charging him with the offense of violating the liquor law of South Carolina violates the Interstate Commerce Clause of the Constitution of the United States under the circumstances of the instant case:

(a) Where Petitioner, a resident of the State of Florida, had bought said whiskey in the State of North Carolina immediately prior to its confiscation and was in transit from the State of North Carolina;

(b) Where Petitioner intended to carry said whiskey with him to the State of Florida;

(c) Where said whiskey was sealed and had not been opened or used by Petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Art. 1, Sec. 8.

"The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States; . . . .

"To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; . . . .

U. S. Constitution, Amendment XXI, Sec. 2.

"*Transportation of liquor into 'dry' state.*

"The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Sec. 65-1267 of the *Code of Laws of South Carolina*, 1952.

"*Stamps for taxes.*

"The taxes levied in Secs. 65-1265 and 65-1266 shall be paid by affixing stamps on each bottle or container of alcoholic liquors. The stamps shall be cancelled by writing or printing thereon the name of the person first having possession of the same in this State for resale within the State and such other data as may be required by the Commission. In case a bottle is enclosed in a sealed metal container, the Commission, in its discretion, may allow the affixing of the required stamps to the metal container instead of to the bottle. The stamps shall be fixed to the bottle or container immediately upon receipt of the alcoholic liquors contained therein or immediately upon the alcoholic liquors being bottled. The stamps required by this section shall be affixed in such manner that their removal shall require continued application of steam and water. When stamps have been once affixed as

provided in this section no other or further stamps shall be required, regardless of how often such alcoholic liquors may be sold or resold within this State."

Sec. 65-1270 of the *Code of Laws of South Carolina*, 1952.

"*Possession of unstamped bottles containing alcoholic liquor.*

"It shall be unlawful for any person to have in possession any bottle or other package containing alcoholic liquor to which the revenue stamps required by Sec. 65-1267 have not been affixed."

STATEMENT OF CASE

During the month of August 1957, Petitioner, a resident of the State of Florida, came to Greenville, South Carolina for the purpose of visiting a friend and during said visit, to-wit, on the 17th day of August, 1957, rode to Hendersonville, North Carolina in an automobile belonging to the friend he was visiting and, upon leaving Hendersonville, went to Tryon, North Carolina. While in Tryon, Petitioner purchased four four-fifths of whiskey for the purpose of carrying the same with him back to his home in Florida. Upon leaving Tryon and entering Greenville County, South Carolina, certain agents of the South Carolina Tax Commission stopped the driver of the automobile in which Petitioner was riding, arrested Petitioner and charged him with having said whiskey unlawfully in his possession inasmuch as the same did not have affixed there to South Carolina revenue stamps, upon which charge Petitioner was convicted by the Trial Magistrate in Greenville, South Carolina. Upon an appeal by Petitioner to the Greenville County Court on the ground that said whiskey was being transported in interstate commerce said conviction was reversed and set aside. Respondent appealed to the Supreme Court of South Carolina and the Supreme Court reversed the County Judge, holding that the whiskey was not in interstate commerce at the time of Petitioner's arrest.

REASONS FOR GRANTING THE WRIT

The Supreme Court of South Carolina in its decision stated that since the adoption of the Twenty-first Amendment, each State has power, unfettered by the Commerce Clause, to regulate or prohibit the importation of intoxicating liquor for delivery or use within its borders. The Court further stated that it may impose reasonable regulations upon the transportation of liquor through its territory from one neighboring State to another. Section 65-1270 of the *Code of Laws of South Carolina*, 1952, as amended in 1956, does not, however, purport on its face to prohibit or regulate interstate shipments of liquor into or through the State of South Carolina to another State. *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 64 S. Ct. 622.

The Statute of South Carolina under consideration in the instant case is to be distinguished from those in the cases of *Duckworth v. Arkansas*, 314 U.S. 390, 62 S.Ct. 311, 86 L.Ed. 294, 138 A.L.R. 1144, and *Carter v. Commonwealth of Virginia*, 321 U.S. 131, 64 S. Ct. 464, cited by the Court below. In these two cases, the Court was confronted with statutes which in clear terms regulated and controlled interstate transportation of whiskey or whiskey transported through those States.

It is conceded by Petitioner that a State may affirmatively regulate whiskey in interstate commerce in the absence of Congressional action.

Section 65-1270 of the *Code of Laws of South Carolina*, 1952, as amended in 1956, the violation of which was charged in the warrant, does not purport to control or regulate the movement of liquor through South Carolina in interstate commerce. It necessarily applies under the authority of the Twenty-first Amendment only with respect to delivery or use of intoxicating liquors within the State of South Carolina.

The undisputed facts are that the whiskey, seized without warrant by the South Carolina officers, was purchased in the State of North Carolina. At the time of the Petitioner's arrest and the seizure of the whiskey in the State of South Carolina, the whiskey was in transit ultimately destined for the State of Florida. There had been neither delivery nor use in South

Carolina. There had been no stoppage in transit and the whiskey was actually moving in interstate commerce at the time of its seizure and the arrest of the Petitioner. *Champlain Realty Co. v. Town of Brattleboro,* 260 U. S. 366, 43 S. Ct. 146.

It is respectfully submitted, for the reasons above stated, that this Court should grant this Petition for a Writ of Certiorari, should reverse the judgment of the Supreme Court of the State of South Carolina and should affirm the Order of the Judge of the Greenville County Court.

Respectfully submitted,

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INDEX TO APPENDIX

	Page
Order of County Court of Greenville County	9
Opinion of the Supreme Court of South Caorlina	12

ORDER OF COUNTY COURT OF GREENVILLE COUNTY

This matter comes before me on an appeal by the defendant from the Court of John S. Loftis, Magistrate, Greenville County, South Carolina.

According to the record in this case, a warrant was procured through the Court of John S. Loftis, Magistrate at Taylors, South Carolina, charging the defendant with the offense of violation of the liquor law in that said defendant did, on the 17th day of August, 1957, wilfully and unlawfully have in his possession four fifths of unstamped liquor. The defendant entered a plea of not guilty and a trial was had before said Magistrate on the 20th day of August, 1957 resulting in said Magistrate convincing said defendant of said offence as charged, and as stated above, from said conviction the defendant has appealed to this Court.

It is undisputed that the defendant is now and has been for some years, a resident and citizen of the State of Florida. According to the record, said defendant, on the 17th day of August, 1957 and for some days prior thereto, was visiting friends in Greenville, South Carolina and on the 17th day of August, 1957, had gone to Hendersonville, North Carolina for the purpose of visiting friends and, upon leaving Hendersonville, came back by way of Saluda and Tryon, North Carolina and, while in Tryon, North Carolina, made a purchase of four fifths of liquor but, upon leaving Tryon, said defendant was stopped a few miles after entering Greenville County, by S. J. Pratt and V. L. Ashmore, two agents of the South Carolina Tax Commission, Beverage Division. Said agents admitted that the whiskey had not been opened and that the defendant informed them at the time they stopped him that he had purchased the whiskey for the purpose of taking it to Florida with him on the following Wednesday.

The record shows that for the past few years the defendant has been in bad health and, according to his testimony, he has been using whiskey constantly for medicinal purposes; that whiskey can be purchased in the State of North Carolina

for an amount considerably less than its cost in Florida and for that reason, he purchased the four fifths of liquor while in North Carolina, this being the amount which, under the law of the State of Florida, he is permitted to bring into said state without any stamp being affixed thereto. However, the prosecution took the position that the mere possession by the defendant of said unstamped whiskey, constituted a violation of the laws of South Carolina while the defendant maintained that he had the right to transport said liquor through the State of South Carolina as said transaction constituted interstate commerce.

The United States Supreme Court has held that the prohibition of the Reed Amendment against transporting liquor in interstate commerce "into" any state or territory, the laws of which prohibit the manufacture and sale of intoxicating liquors for beverage purposes, does not include the movement through a dry state as a mere incident of the transportation of another state, whether such transportation be by personal carriage or by common carrier. *U. S. v. Gudger*, 249 U. S. 373. Likewise, in *Moragne v. State*, 200 Ala. 689, it was held that a state statute forbidding the possession of more than a specified quantity of liquor at one time, and also forbidding the transportation of prohibited liquor over or along any public state or highway, could not constitutionally be made to apply to the transportation of liquor along the public highways of the state in the course of a journey from one state to another in an automobile. Likewise, in the case of *Haumschilt v. State*, 142 Tenn. 520, it was held, in a case in which the defendant purchased the intoxicating liquor in question in one state and was passing through the state of the prosecution on his way to a third state, in which latter state he intended to sell the liquor, that the power of the state to prosecute depended upon whether or not it was legal under the statute of the third state, to sell intoxicating liquor in that state. If it was legal the journey across the state of the prosecution could not be interrupted or penalized by the state officers or courts, but if, on the other hand, it was not lawful to sell the liquor in the third state, then such liquor in transit for such purpose, was deprived of the protection of

the commerce clause of the Federal Constitution by the provisions of the Webb-Kenyon Act.

In view of the facts and law applicable to this case, I am convinced that the trial magistrate was in error in having convicted the defendant of the charge in question, said transaction clearly constituting interstate commerce.

IT IS, THEREFORE, ORDERED that the conviction of the defendant by Magistrate John S. Loftis of the offense in question, be and the same is hereby reversed and set aside.

IT IS FURTHER ORDERED that the South Carolina Tax Commission, Beverage Division, and V. L. Ashmore and S. J. Pratt, its agents, be and they are hereby ordered, required and directed to immediately deliver to the defendant or his attorneys of record, Leatherwood, Walker, Todd & Mann, the four fifths of liquor procured by said agents from the defendant on the 17th day of August, 1957.

W. B. McGOWAN
County Judge

September 18th, 1957

OPINION OF THE SUPREME COURT OF SOUTH CAROLINA

THE STATE, *Appellant*

versus

B. M. KILGORE, *Respondent*.

No. 17415

SUPREME COURT OF SOUTH CAROLINA

April 17, 1958.

LEGGE, A. J.: Defendant was convicted in a magistrate's court of having in his possession four bottles of unstamped whiskey, in violation of Section 5 of the Act of May 28, 1956 (Code Supplement, 1957, Section 65-1270). The Greenville County Court reversed, upon the ground that the whiskey was, at the time of defendant's arrest, moving in interstate commerce; and the State has appealed.

The facts are not in dispute. The defendant, formerly a resident of Greenville, S. C., is now and has been for some years a resident of the State of Florida. On or about August 11, 1957, he came to Greenville by automobile belonging to and driven by friends who went on to Waynesville, North Carolina, leaving him in Greenville where he was to visit friends until August 22, when he intended to return by train to Florida. On August 17, defendant borrowed an automobile from a friend with whom he was staying in Greenville, and went in it to Hendersonville, North Carolina, where he visited briefly with friends there. On his way back to Greenville that day he stopped at Tryon, North Carolina, and there purchased four bottles of whiskey, each containing four-fifths of a quart. He was stopped in Greenville County, South Carolina, by law enforcement officers, to whom he admitted possession and ownership of the whiskey. He showed them the four bottles, unopened, that he

had purchased in Tryon, and to which South Carolina revenue stamps required by Section 65-1267 of the 1952 Code were, of course, not affixed.

Defendant, respondent here, admits that when he was stopped by the South Carolina law enforcement officers he was not en route to Florida. He admits that he intended to return to Florida five days thereafter, and then by train, and not by the automobile in which he was riding at the time of his arrest.

The statute under which respondent was charged declares that "it shall be unlawful for any person to have in possession any bottle or other package containing alcoholic liquor, to which the revenue stamps required by Section 65-1267, *Code of Laws of South Carolina*, 1952, have not been affixed." Penalty is, for a first offense, fixed at "a fine of one hundred dollars or imprisonment for thirty days."

Since the adoption of the Twenty-first Amendment, each state has power, unfettered by the commerce clause, to regulate or prohibit the importation of intoxicating liquor for delivery or use within its borders. *One Hundred Second Cavalry Officers' Club v. Heise*, 201 S.C. 68, 21 S.E. (2d) 400; *Finch & Co. v. McKittrick*, 305 U.S. 395, 59 S. Ct. 256, 83 L. Ed. 246; *Ziffrin v. Reeves*, 308 U. S. 132, 60 S. Ct. 163, 84 L. Ed. 435. Independently of the Twenty-first Amendment, it may, without offending the commerce clause, impose reasonable regulations with regard to the transportation of intoxicating liquor through its territory from one neighboring state to another. *Duckworth v. Arkansas*, 314 U.S. 390, 62 S. Ct. 311, 86 L. Ed. 294, 138 A. L. R. 1144; *Carter v. Virginia*, 321 U. S. 131, 64 S. Ct. 464, 88 L. Ed. 605.

In the case at bar the admitted facts are not reasonably susceptible of inference that the whiskey was in interstate commerce at the time of respondent's arrest. Respondent's journey from Tryon to Greenville was not an integral part of its continuous transportation from North Carolina to Florida; its intended stopover in Greenville could not reasonably be considered as a delay necessarily incident to, and therefore essentially a part of, such transportation. The leading case of

Coe v. Errol, 116 U. S. 517, 6 S. Ct. 475, 29 L. Ed. 715, was concerned with the right of the Town of Errol, New Hampshire, to impose a tax on logs that had been hauled during the previous winter from a location in that state and placed in and near a stream in the Town of Errol, to be thence floated down the Androscoggin River into the state of Maine, there to be manufactured and sold. Discussing the applicability of the commerce clause to that situation, the court said:

> "Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise point for solution.
>
> "This question does not present the predicament of goods in transportation through a state, although detained for a time within the state by low water or other causes of delay, as was the case of the logs cut in the state of Maine, the tax on which was abated by the supreme court of New Hampshire. Such goods are already in the course of commercial transportation and are clearly under the protection of the Constitution. And so, we think, would the goods in question be when actually started in the course of transportation to another state, or delivered to a carrier for such transportation. There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination * * * Such goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another state or have been started upon such transportation in a continuous route or journey."

By like reasoning, grain in transit from southern and western states to eastern cities, which had been removed from cars by its owner and placed in his private grain elevator in Chicago, was held taxable by the State of Illinois although it

was the owner's intention to forward it promptly, after inspection and weighing, according to the shipping contracts. *Bacon v. Illinois*, 227 U. S. 504, 33 S. Ct. 299, 57 L. Ed. 615.

Excepting such interruption as may be "due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement," continuity of transit from one state to another or to a foreign country is essential to preclude a valid exercise of the taxing or regulatory powers of an intermediate state with regard to personal property within its borders. *Carson Petroleum Co. v. Vial*, 279 U. S. 95, 49 S. Ct. 292, 73 L. Ed. 626; *Minnesota v. Blasius*, 290 U. S. 1, 54 S. Ct. 34, 78 L. Ed. 131; *Independent Warehouse v. Scheele*, 331 U.S. 70, 67 S. Ct. 1062, 91 L. Ed. 1346.

In the instant case the whiskey was not in movement through this state at the time of respondent's arrest. Admittedly it was to be held in Greenville not in necessary delay or accommodation to the means of its transportation from North Carolina to Florida. It was therefore, at the time before stated, not within the protection of the commerce clause.

Respondent testified at his trial, as the County Judge mentioned in his order, that for the past several years he has had to use whiskey constantly for medicinal purposes, and that under the law of Florida one is permitted to bring into that state four-fifths of a gallon of whiskey without any revenue stamps affixed thereto. But these matters are irrelevant to the issue of his guilt. The statute being within the police power of the state and, in the circumstances, not within the scope of the commerce clause, his offense was complete when he violated its provisions, regardless of motive or intent. *State v. Manos*, 179 S.C. 45, 183 S.E. 582.

Reversed.

STUKES, C. J., TAYLOR, OXNER and MOSS, JJ., concur.